

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF IN FORMA PAUPERIS FOR APPELLANT

24,031

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ELMER E. JOHNSON, JR.

Appellant

APPEAL FROM A CRIMINAL CONVICTION IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN PERMITTING AN IN-COURT IDENTIFICATION OF THE DEFENDANT BY A WITNESS WHO HAD PREVIOUSLY MADE A PHOTOGRAPHIC IDENTIFICATION OF THE DEFENDANT FROM 2 SETS OF PHOTOGRAPHS AMONG WHICH THE DEFENDANT'S PHOTOGRAPH WAS THE ONLY COLOR PHOTOGRAPH? DID THE GOVERNMENT ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT THERE WAS AN INDEPENDENT SOURCE FOR THE IN-COURT IDENTIFICATION?

This case has not previously been before this Court.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,031

UNITED STATES OF AMERICA

Appellee

v.

ELMER E. JOHNSON, JR.

Appellant

APPEAL FROM A CRIMINAL CONVICTION IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Under an indictment filed in the United States District Court for the District of Columbia on August 5, 1969, appellant was charged with one count of second degree burglary (22 D.C. Code 1801(b)) and one count of petit larceny (22 D.C. Code 2202). Appellant was tried by a jury on December 23, 1969, and convicted on that same date. Appellant was sentenced by Judge John H. Pratt on February 16, 1970, pursuant to 18 U.S.C. § 5010(b) (Federal Youth Corrections Act). An appeal was noted on that same date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291 (1964).

STATEMENT OF THE CASE

On May 22, 1969, Mrs. Maggie Nixon left her apartment at 2202 Savannah Terrace, S.E. at about 7 A.M. (Tr. 4-5) Around 2 P.M. Mrs. Nixon received a telephone call to return to her apartment,

and upon arriving at her apartment she observed the lock on her door was off and she was unable to get in. One of the janitors, Mr. Daniels, helped her get in. Inside Mrs. Nixon discovered that her television set, clock radio, a .22 pistol, and some change were missing. Afterward Mrs. Nixon called the police, and when they arrived she was taken by them to a television repair shop several blocks from her apartment where she was able to identify her television set. (Tr. 5-7)

Mr. James Daniels, a janitor for the apartment complex in which Mrs. Nixon resided, testified that during the early afternoon of May 22, 1969, he was sitting on a pair of steps across from Mrs. Nixon's building when he observed 3 men come out of the building, one of which had something on his shoulders covered by a blanket and the blanket was dragging. (Tr. 10-11) At that time Ricks told Mr. Ricks drove up, and Mr. / Mr. Daniels about the three individuals he (Mr. Ricks) had seen and that these individuals "went on up the hill." (Tr. 11) Mr. Ricks proceeded in his truck up the hill in the direction Mr. Daniels had indicated. Mr. Daniels then checked inside the door from which the three had emerged and discovered that the security lock on Mrs. Nixon's door "was tore completely out." (Tr. 11-12) Mr. Daniels was unable to identify the defendant as one of the men he had seen emerge from the apartment building. (Tr. 12)

Mr. John S. Ricks testified that on May 22, 1969, he had followed 3 men in his car up Savannah Terrace, parked in an alley between 22nd and 23rd Street, got out of his car and went to the corner of 22nd Street where he peeped in the door of a television

shop where he observed some of the men inside the shop. (Tr. 20-24)
Mr. Ricks could make no in-court identification. The last he saw of the 3 men they were leaving the television shop and walking into a gas station nearby. (Tr. 24)

Mr. David Jerome Buchanan testified that on May 22, 1969, he was working as the owner of Dave's TV Lab at 3218 22nd Street, S.E. and that on that date the defendant entered the shop around the ^{hour} luncheon/ in the company of 2 other males. The defendant set a television set down and requested that Buchanan fix the antenna. Mr. Buchanan said, "okay, be back in a half hour." (Tr. 30-32)
Buchanan testified that on June 10, 1969, he identified the defendant in a lineup as the person who brought the television set into his shop on May 22. (Tr. 33) Prior to the 22nd of May Buchanan had seen the defendant a number of times. (Tr. 38)

Detective Edwin F. Goodall testified he investigated the May 22 burglary and was familiar with the to the south of Dave's TV Lab, between 22nd and 23rd Streets, and that there were usually a number of abandoned automobiles in the alley and that he could not recall anyone sleeping or sitting in the automobiles. (Tr. 41-44)

The defendant testified that on May 22 at about 1:30 P.M. he had left his apartment at 1324 Savannah Street, S.E. and gone to King's Liquor Store on 23rd Street and Alabama Avenue, S.E. where he had purchased a quart of beer and then proceeded to the alley between 22nd and 23rd Street. In the alley he had gotten into an abandoned car to drink. Inside the car he discovered a television set. After drinking his beer he took the set to Dave's TV Lab where he informed Dave Buchanan that he had found the set in a car in the alley and asked Buchanan to see what was wrong with it. Buchanan

agreed and instructed the defendant to return in one hour. (Tr. 48-51) On cross examination the defendant testified that he never returned to pick up the set because Buchanan had purchased the set from the defendant. (Tr. 55-56)

Pre-Trial Motion to Suppress Identification

The defendant filed a motion to suppress the identification of the defendant by David Buchanan. At the hearing on the motion Buchanan testified that prior to May 22, 1969, he had seen the defendant "Several times, on many occasions." (Tr. of hearing, 4) Buchanan testified that on May 22 the defendant was in his television shop for about 3 minutes or less. After Buchanan was contacted about the burglary he found out the name of the defendant from an attendant at a grocery store nearby. (Tr. of hearing, 5) Some time later Buchanan viewed some photographs and he picked out a photograph of the defendant. (Tr. of hearing, 6-8) On June 10, 1969, Buchanan testified he attended a lineup where he identified the defendant. (Tr. of hearing, 8-9)

Detective Goodall testified that he showed 2 sets of photographs to Buchanan and that Buchanan picked out the photograph of the defendant, a color photograph. (Tr. of hearing, 15-17) On June 10, 1969, Goodall testified that Buchanan picked out the defendant in a lineup. (Tr. of hearing, 18) Detective Goodall admitted that the color photograph of the defendant was the only color photograph in the two sets of photographs shown to Buchanan. (Tr. of hearing, 18) The Court found that the photographic identification "may have been suggestive" (Tr. of hearing, 22) but concluded that there was an independent source and that the government would be permitted to elicit testimony concerning the lineup and in-court identification. (Tr. of hearing, 22)

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SUMMARY OF ARGUMENT

The court erred in permitting the government to produce testimony concerning an in-court and lineup identification of the defendant where the evidence revealed that after the alleged crime a witness was shown a number of photographs and picked out a photograph of the defendant, the photograph of the defendant being the only color photograph in the group. The court erred in finding there was an independent source where the evidence revealed that the witness had been in the presence of the defendant for at most 3 minutes, had seen the defendant on several occasions prior to this viewing although the witness did not know the name of the defendant.

I

ARGUMENT

THE COURT ERRED IN PERMITTING THE ADMISSION OF EVIDENCE OF THE LINEUP AND IN-COURT IDENTIFICATION OF THE DEFENDANT WHERE THE EVIDENCE REVEALED THAT PRIOR TO THE LINEUP THE WITNESS HAD PICKED THE DEFENDANT'S PHOTOGRAPH FROM A NUMBER OF PHOTOGRAPHS, THE DEFENDANT'S PHOTOGRAPH BEING THE ONLY COLOR PHOTOGRAPH IN THE GROUP. THE COURT ERRED IN FINDING THERE WAS AN INDEPENDENT SOURCE WHERE THE EVIDENCE REVEALED THAT THE WITNESS HAD VIEWED THE DEFENDANT FOR AT MOST 3 MINUTES DURING THE TIME OF THE ALLEGED OFFENSE AND THAT HE HAD SEEN THE DEFENDANT ON SEVERAL OCCASIONS PRIOR TO THAT TIME BUT DID NOT KNOW THE NAME OF THE DEFENDANT AT THAT TIME.

(Pretrial hearing 1-23)

In Simmons v. United States, 390 U.S. 377 (1968) the Supreme

Court noted the dangers that can exist in photographic identification. The Court stated that an in-court identification would be set aside if the photographic procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, under the standard established in Stovall v. Denno, 388 U.S. 293 (1967).

The photographic identification of the defendant was made in the instant case by the only government witness who was able to make an in-court identification of the defendant. David Buchanan, the owner and attendant at the television shop on May 22, testified that prior to attending a lineup on June 10, 1969, he had made a photographic identification of the defendant. This photographic identification was made from two sets of photographs, which were shown to Buchanan by Officer Goodall. Goodall testified that Buchanan picked out the photograph of the defendant, and that the photograph of the defendant was the only color photograph in the two sets of photographs viewed by Buchanan. (Tr. of hearing, 15-18) The trial judge stated that the photographic identification "may have been suggestive" but went on to conclude that there was an independent source. (Tr. of hearing, 22)

In determining whether or not there is sufficient evidence of an independent source the Court of Appeals has focused on various factors. These factors are the circumstances under which the witness had an opportunity to observe the perpetrator, the amount of detail and accuracy in the description given by the witness, the ability of a witness to discriminate among suspects, and in some cases on whether or not the witness stated that his in-court identification was based on his recollection from the crime and not from the

physical confrontation or photographic viewing. Cases concerned with the opportunity of the witness to observe have focused on lighting, Long v. United States, No. 22,218 (Dec. 18, 1969) (daylight); Gregory v. United States, No. 21,089 (Mar. 18, 1969) ("conditions of good lighting"); Russell v. United States, No. 21,571 (Jan. 24, 1969) ("the area was well-lighted, and that daylight was breaking"), the length of time the witness had to observe the perpetrator, Gregory v. United States, supra (witness watched perpetrator for 3 or 4 minutes); Frazier v. United States, No. 21,426 (Mar. 14, 1969) (robbery took from 6 to 10 minutes), the state of mind of the witness, including whether the witness was a victim or an observer, Hawkins v. United States, No. 21,997 (July 9, 1969) (no showing that witness in a distraught state of mind); Gregory v. United States, supra (witness not a victim); Williams v. United States, No. 21,072 (Feb. 24, 1969) (witness displayed coolness during robbery), and the distance from which the witness observed, Long v. United States, No. 22,218 (Dec. 18, 1969) (witness viewed perpetrator at close quarters).

In the instant case the witness Buchanan testified that the defendant had entered his television shop around the luncheon hour on May 22, 1969, and remained in the shop for about 3 minutes, during which time Buchanan conversed with the defendant concerning a television set which the defendant had brought in. There was no evidence elicited from Buchanan that Buchanan had paid any particular attention to the defendant, such as a witness or victim of a crime might be expected to do.

The testimony at the pre-trial motion to suppress disclosed that

Officer Goodall obtained the defendant's first name of "Elmer" from Buchanan during the investigation of the burglary; that Goodall then displayed 2 sets of photographs to Buchanan and that all of the photographs were black and white except for the color photograph of the defendant. Buchanan testified that he had not known the name of the person who entered his television shop on May 22 (later identified as the defendant). (Tr. of hearing, 11) There was no testimony elicited from Buchanan that his in-court identification was based on his recollection from May 22 and not from the photographic identification.

Although the witness Buchanan picked the defendant from a lineup on June 10, 1969, the argument of defense counsel in moving to suppress the in-court identification was that the photographic identification could have infected the in-court identification.

Conclusion: In the instant case there was evidence that the viewing of photographs by the witness was impermissibly suggestive. that there was an independent source for the in-court identification. The government failed to establish by clear and convincing evidence/

CONCLUSION

WHERE, appellant respectfully requests that his conviction be reversed.

Respectfully submitted,

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Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was hand-delivered to Appellate Section, Office of the United States Attorney, U.S. Court House, Washington, D.C. on this ____ day of _____, 1970.

Raymond w. Russell

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,031

UNITED STATES OF AMERICA, APPELLEE

v.

ELMER E. JOHNSON, JR., APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
WARREN L. MILLER,
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Cr. No. 1236-69

United States Court of Appeals

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| *(<i>Anthony</i>) <i>Long v. United States</i> , D.C. Cir. No. 22,218, decided December 18, 1969 | 5 |
| * <i>United States v. Kemper</i> , D.C. Cir. No. 22,558, decided July 10, 1970 | 6 |
| * <i>United States v. (Clinton) Long</i> , — U.S. App. D.C. —, 422 F.2d 712 (1970) | 5 |
| <i>United States v. McNeil</i> , D.C. Cir. No. 22,360, decided October 31, 1969 | 5 |
| * <i>United States v. Wade</i> , 388 U.S. 218 (1967) | 6 |

OTHER REFERENCES

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| 22 D.C. Code § 1801(b) | 1 |
| 22 D.C. Code § 2202 | 1 |

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the trial court erred in permitting evidence of a lineup identification and also an in-court identification of appellant?

* This case has not previously been before this Court.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,031

UNITED STATES OF AMERICA, APPELLEE

v.

ELMER E. JOHNSON, JR., APPELLANT

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On August 5, 1969, appellant was charged in a two-count indictment with second-degree burglary and petit larceny (22 D.C. Code § 1801(b) and 2202). Following a pre-trial hearing on a motion to suppress the identification, which was denied, a trial before Judge John H. Pratt and a jury was held in District Court on December 23, 1969. Appellant was found guilty as charged, and on February 16, 1970, he was sentenced under the Federal Youth Corrections Act, 18 U.S.C. § 5010(b). This appeal followed.

The Pre-Trial Hearing

David J. Buchanan testified that around 1:00 p.m. on May 22, 1969, he was at work in his television repair shop (Dave's TV Lab) at 3218 22nd Street, Southeast, when three men entered his shop with a television set.

He identified appellant as the person who was carrying the television set and who asked him to repair the antenna (Motion Tr. 4-5). Mr. Buchanan stated that he recognized appellant from seeing him in his shop approximately a month and a half earlier when he brought in a radio to be repaired (Motion Tr. 9-10) and also from having seen him several times in the neighborhood (Motion Tr. 4-5).¹ When the television was brought into the shop, Buchanan had an opportunity to observe appellant for about three minutes (Motion Tr. 13) under good lighting conditions (Motion Tr. 5). He stated that appellant was wearing a green banlon sweater and was dark, tall (about six feet), and heavy (Motion Tr. 5). Mr. Buchanan stated he was shown some photographs by the police and he identified appellant from a photograph as being the person who brought in the television set. The witness also identified appellant at a police lineup held on June 10, 1969 (Motion Tr. 6-9). Buchanan stated that of the twelve photos shown to him, only appellant's photograph was in color (Motion Tr. 14).

Detective Edwin A. Goodall testified that he showed Mr. Buchanan two sets of photographs from which he immediately picked out the two photographs of appellant (one of which was in color). Detective Goodall also verified that Mr. Buchanan identified appellant at the lineup, at which appellant was represented by counsel (Motion Tr. 16-20).

The Government conceded that the photographic identification might have been suggestive and advised the court that it would not refer to it at trial. Appellant's trial counsel argued, however, that no out-of-court or in-court identifications should be permitted. The court found that the evidence was "conclusive that [Mr. Buchanan] had an independent source for identifying [appellant]" and that the photographic identification did not taint the

¹ The witness' recognition of appellant was such that he was able to find out his name from neighbors (at the grocery store where Mr. Buchanan knew appellant "hanged out") and tell it to the police (Motion Tr. 4-6).

independent source of the other identifications. Accordingly, the court ruled that the in-court and lineup identifications were premissible (Motion Tr. 22).

The Trial

Mrs. Maggie M. Nixon testified that on May 22, 1969, she left her apartment at 2202 Savannah Terrace, Southeast, at about 7:00 a.m. Around 2:00 p.m. she received a telephone call to return to her apartment, and upon arriving there she discovered that her apartment had been broken into and a television set, a clock radio, a .22 caliber pistol, a blanket, and some change were missing. Mrs. Nixon called the police and was later taken by them to Mr. Buchanan's store, where she identified her television set (Tr. 4-7).

Mr. James Daniels, the janitor for the apartment house in which Mrs. Nixon lived, testified that in the early afternoon on the day of the offense he was sitting across the street from 2202 Savannah Terrace when he observed three men emerge from the building, one of whom was carrying something on his shoulders that was covered by a blanket. As he started to go over to them, Mr. John S. Ricks, the resident manager for the apartment building, drove up in his car (Tr. 10-11, 20). Mr. Daniels related to him what he had observed, and Mr. Ricks proceeded in his truck up the hill in the direction Mr. Daniels had indicated. Mr. Daniels then checked inside the apartment building and found the lock on Mrs. Nixon's door "was tore completely out." At trial Mr. Daniels was unable to identify appellant as one of the men he saw emerge from the building (Tr. 11-12).

Mr. Ricks testified that after speaking with Daniels he went after the three men in his car and parked in an alley between 22nd and 23rd Streets. After parking the car he observed the three men walk by carrying the television set (Tr. 21-22). Mr. Ricks waited until they had turned the corner and then "peeped in the door" of the television shop where he saw the men. The three men then left the television shop and walked to a nearby gas

station. Because the men had their backs to him at all times, Mr. Ricks was unable to make any identification of appellant (Tr. 22-24).

The Government next called David J. Buchanan, owner of the television repair shop to which the three men had brought the television set. Mr. Buchanan testified that on May 22, 1969, appellant brought in a television and asked him to repair the antenna of the set. This was the same set which was identified by Mrs. Nixon later that same afternoon. Mr. Buchanan testified that he identified appellant at a lineup held on June 10, 1969, and that he recognized his face from seeing him around the neighborhood and from the time appellant had brought a radio into the store to be repaired a month earlier (Tr. 30-35). Detective Edwin F. Goodall testified regarding the location of Buchanan's shop and the fact that Mrs. Nixon identified the television set that same afternoon (Tr. 41-44).

Appellant took the stand in his own behalf and testified that on May 22, 1969, at about 1:30 p.m. he had purchased a quart of beer at a liquor store on 23rd Street. He then proceeded to the alley between 22nd and 23rd Streets and got into an abandoned car to drink. Inside the car he discovered the television set, and after finishing the beer he took the set to Dave's TV Lab, where he asked Mr. Buchanan to check what was wrong with it (Tr. 49-51). On cross-examination appellant claimed that Mr. Buchanan bought the television from him for \$6.00 (Tr. 55-56).

ARGUMENT

The trial court properly ruled that there was an independent source for the witness' lineup and in-court identification of appellant.

(Motion Tr. 4-6, 9-10, 13, 21-22).

Appellant contends the trial court erred in ruling that Mr. Buchanan's lineup and in-court identifications of appellant were premised upon an independent source. In

striving to overcome the trial court's finding of an independent basis, however, appellant must shoulder a heavy burden. *United States v. (Clinton) Long*, — U.S. App. D.C. —, —, 422 F.2d 712, 715 (1970); see *(Anthony) Long v. United States*, D.C. Cir. No. 22,218, decided December 18, 1969; *Clemons v. United States*, 133 U.S. App. D.C. 27, 34, 408 F.2d 1230, 1237 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969). Unless the court's decision lacks substantial support in the evidence it must not be disturbed. *Cf. United States v. McNeil*, D.C. Cir. No. 22,360, decided October 31, 1969, slip op. at 6.

In the instant case Mr. Buchanan was initially shown a group of photographs from which he identified appellant. Since appellant's photograph was the only one that was in color, the possibility existed that the photographic identification might have been suggestive. Realizing this factor, the Government advised the court that it would not refer to the photographic identification at trial, but requested that evidence of the lineup identification and an in-court identification be allowed (Motion Tr. 21). Appellant's trial counsel argued that although he felt the court's summary of the evidence regarding independent source was fair, the photographic identification "could have infected the independent source" (Motion Tr. 22). The court ruled that while the photographic viewing might have been suggestive, it did not taint the independent source of Mr. Buchanan's identifications and that therefore the lineup and in-court identifications of appellant were permissible (Motion Tr. 22). That ruling was plainly correct.

The evidence clearly established that prior to the photographic identification Mr. Buchanan was capable of making a spontaneous identification of appellant based upon a previous business transaction with him and Mr. Buchanan's observations of appellant in his shop on the day of the offense. It was established that Mr. Buchanan had seen appellant in the neighborhood several times before May 22, 1969 (Motion Tr. 4); that he remembered appellant had brought in a radio to be repaired approxi-

mately a month and a half before the day of the offense (Motion Tr. 9-10); and that appellant's face was familiar to him (Motion Tr. 9). Moreover, on the day in question he had an opportunity to observe appellant for a period of about three minutes (Motion Tr. 5, 13), under good lighting conditions (Motion Tr. 5), and at arm's length while talking to him (Motion Tr. 5). In addition, Mr. Buchanan was able to describe appellant as being about six feet tall, dark, heavy, and wearing a light green Banlon sweater at the time (Motion Tr. 5). The strength of his ability to identify appellant was further demonstrated when Mr. Buchanan obtained appellant's name from the grocery store attendant to whom he gave a description of appellant that same afternoon (Motion Tr. 4-6).

We submit that the record, when analyzed for factors² that meet the requirement of independent source, clearly provides abundant support for the trial court's ruling that the lineup and in-court identifications of appellant had such a foundation.

CONCLUSION

WHEREFORE, appellee respectfully requests that the judgment of the District Court should be affirmed.

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Assistant United States Attorneys.

² See *United States v. Wade*, 388 U.S. 218, 241 (1967), and *United States v. Kemper*, D.C. Cir. No. 22,558, decided July 10, 1970, slip op. at 8-15, for a partial listing of factors to be considered.

